Supreme Court, U.S.
FILED
FEB 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-876

In the Supreme Court of the United States

OCTOBER TERM, 1989

MIRIAM BEN-SHALOM, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Army acted constitutionally when it denied petitioner reenlistment after she admitted that she is a homosexual.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Baker v. *Wade*, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) 11

Beller v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) 6-7, 11

benShalom v. *Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980) 2

Ben-Shalom v. *Secretary of Army*, 826 F.2d 722 (7th Cir. 1987) 2

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 10, 11

Chappell v. *Wallace*, 462 U.S. 296 (1983) 10

Dronenburg v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984) 6, 11

Gilligan v. *Morgan*, 413 U.S. 1 (1973) 10

Goldman v. *Weinberger*, 475 U.S. 503 (1986) ... 9, 12

Greer v. *Spock*, 424 U.S. 828 (1976) 12

Hatheway v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981)... 8

Johnson v. *Orr*, 617 F. Supp. 170 (E.D. Cal. 1985), aff'd, 787 F.2d 597 (9th Cir. 1986) 12

Padula v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) 11

Rich v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) 6, 11

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 10

Cases—Continued: Page

Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 10
United States v. *O'Brien*, 391 U.S. 367 (1968) ... 5
United States v. *MacIntosh*, 283 U.S. 605 (1931) 10
Watkins v. *United States Army*:
837 F.2d 1428 (9th Cir. 1988) 7
875 F.2d 699 (9th Cir. 1989) 7
Woodward v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), petition for cert. pending, No. 89-344...6, 7, 11

Constitution, statute and regulations:

U.S. Const:
Amend. I 2, 4, 5, 9, 12
Amend. V..... 4, 5
Amend. XIV (Equal Protection Clause) 11
Uniform Code of Military Justice, art. 125, 10 U.S.C. 925 8
Army Reg:
Reg. 135-178, para. 7-5(b)(6) 2
Reg. 140-111, Tab. 4-2, Rule E 3, 4

Miscellaneous:

DOD Directive No. 1332.14 (Jan. 28, 1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-876

MIRIAM BEN-SHALOM, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A55-A92) is reported at 703 F. Supp. 1372. The opinion of the court of appeals (Pet. App. A1-A54) is reported at 881 F.2d 454.

JURISDICTION

The judgment of the court of appeals (Pet. App. A120-A121) was entered on August 7, 1989. A petition for rehearing was denied on October 11, 1989 (Pet. App. A122-A123). The petition for a writ of certiorari was filed on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is currently a Technical Sergeant in the United States Army Reserve stationed in Milwaukee, Wisconsin.

Pet. 3. She has publicly announced that she is homosexual. Pet. App. A1. This protracted litigation concerns petitioner's attempt to continue her service in the Army Reserve despite the Army's regulations barring service by homosexuals.

1. In December 1976, the Army discharged petitioner pursuant to then-existing Army Reg. 135-178, para. 7-5(b)(6), which provided for the discharge of any soldier who "evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts." See *benShalom* v. *Secretary of Army*, 489 F. Supp. 964, 971 (E.D. Wis. 1980). Petitioner filed suit claiming that her discharge violated her constitutional rights to free speech and privacy. The district court held that the then-existing Army regulations were unconstitutionally overbroad under the First Amendment. *benShalom* v. *Secretary of Army*, *supra*. The court ruled that the "broad sweep" of those regulations infringed on the right of soldiers to "meet with homosexuals and discuss current problems," and to "read[ ] anything that might be construed as a homosexually-oriented book or magazine," or to "make any statements that might be interpreted as supporting homosexuality." 489 F. Supp. at 974. The district court also held that the Army's regulation violated petitioner's right to privacy because "constitutional privacy principles clearly protect one's sexual *preferences* in and of themselves from government regulation." 489 F. Supp. at 976. The court ordered that petitioner be reinstated in the Army. 489 F. Supp. at 977.

The government did not appeal from the finding of liability. Instead, the Army revised its regulations regarding homosexuals to address the district court's concern that the regulations were overbroad. The parties, however, continued to litigate the proper remedy for petitioner. That dispute ended with a decision of the court of appeals in *BenShalom* v. *Secretary of Army*, 826 F.2d 722 (7th Cir. 1987),

that required the Army to reinstate petitioner for an 11-month period.

2. Petitioner's enlistment, as extended by the court's order, expired on August 11, 1988. Before that date, petitioner requested reenlistment for a new six-year term of service. Pet. App. A6. In March 1988, petitioner's commanding officer notified her that the Army was considering whether she should be barred from reenlistment under Army Reg. 140-111, Tab. 4-2, Rule E, on the ground that she is homosexual.[1] Under those regulations, which became effective on January 1, 1983, homosexuality is identified as a "nonwaivable moral and administrative disqualification" for reenlistment.

---

[1] Table 4-2, Rule E (Pet. App. A6-A7 n.3) sets forth the following disqualification:

> E. Questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies. (See note 1.)
>
> Notes:
>
> 1. Homosexual acts consist of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently [isolated] episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. *Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.* [Emphasis added.]

The Army's March 1988 notice to petitioner informed her that her repeated admissions of homosexuality gave rise to a presumption that she is homosexual, but that she had 30 days to submit a response rebutting that presumption. Pet. App. A8. Petitioner responded by stating: "I am a lesbian." Sep. App. 8;[2] see also Pet. App. A8. After reviewing her statement, the Army concluded that petitioner is an admitted homosexual and thus barred from reenlistment under Army Reg. 140-111, Table 4-2, Rule E. Sep. App. 13. Ben-Shalom was formally notified of that decision on April 7, 1988. Pet. App. A8.

3. Petitioner then filed this action claiming that the Army's refusal to permit her to reenlist violated the First and Fifth Amendments. Pet. App. A8-A9. On August 3, 1988, a few days before petitioner's enlistment was to expire, the district court entered a temporary injunction ordering the Army to consider her reenlistment request without regard to her homosexuality. *Id.* at A112. After the Army found petitioner to be otherwise qualified, it extended her original enlistment pending the conclusion of this litigation.

Petitioner later filed a motion for civil contempt against the Army on the ground that the Army had disobeyed the district court's order. Petitioner argued that the Army was required to grant her a new enlistment contract, not merely extend her original enlistment period. The district court agreed with petitioner and entered a finding of contempt against the Army. Pet. App. A111-A117. The district court also imposed a fine of $500 per day against the Army, but delayed imposition of the fine to allow the Army to seek a stay from the court of appeals. *Id.* at A116. Rather than seek a stay, the Army complied with the district court's order. Under the terms of the reenlistment, petitioner's new

---

[2] 'Sep. App." refers to the Separate Appendix filed in the court of appeals in appeal No. 88-2771.

enlistment contract will be considered void if the district court's order is reversed.

On January 10, 1989, the district court entered its final order holding the Army's regulations to be unconstitutional under both the First and Fifth Amendments. Pet. App. A55-A92. The district court held that the Army's reliance on petitioner's admission of homosexuality, without evidence of her having engaged in homosexual acts, violated her free-speech rights protected by the First Amendment. Pet. App. A76. The court also held that the Army's exclusion of homosexuals, without evidence of homosexual acts, violated the equal-protection component of the Fifth Amendment. The court reasoned that the Army's treatment of persons based on their "sexual orientation" constitutes a suspect classification, which is subject to strict scrutiny. *Id.* at A87. The court held, however, that even if strict scrutiny did not apply, the regulation excluding homosexuals (without evidence of homosexual conduct) was not rationally related to any legitimate governmental interest. *Id.* at A88-A91.

4. The court of appeals reversed the district court's judgment. Pet. App. A1-A54. The court rejected petitioner's First Amendment challenge to the Army's regulations. The court determined that, under the new regulations, petitioner "is free * * * to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes." Pet. App. A32. The court reasoned that it is her "identity" as a homosexual that makes her ineligible for military service, "not the speaking of it aloud." *Ibid.* Moreover, relying on this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court of appeals held that, even if the regulation "affects speech, it does so only incidentally, in the course of pursuing other legitimate goals." Pet. App. A32.

The court of appeals also rejected petitioner's equal-protection argument. The court held that the "deferential" rationality standard of review is applicable, and that "the Army satisfies that standard without any difficulty." Pet. App. A44. The court of appeals disagreed with petitioner's claim that strict scrutiny was required because the Army's regulation is based on status instead of conduct. The court of appeals noted that this case is not about status; rather, petitioner's repeated admissions of her homosexuality are "compelling evidence that [she] has in the past and is likely to again engage in [homosexual] conduct." *Id.* at A42.

Applying the rationality test, the court concluded that "[t]he new regulation * * * clearly promotes a legitimate government interest sufficient to survive rational basis scrutiny." Pet. App. A49. Because this case involves the composition of the armed forces, the court ruled that the military's judgment is entitled to deference and that the classification created by the regulation is "supported by military considerations and should be left to the Army." *Ibid.* Accordingly, the court concluded that it was "unwilling to substitute a mere judge-made rule for the Army's regulation or to act in an executive or legislative fashion." *Id.* at A51.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. The courts of appeals have consistently upheld military regulations barring service by homosexuals. See *Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), petition for cert. pending, No. 89-344; *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller* v. *Midden-*

dorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). The only appellate decision invalidating the military regulations, *Watkins* v. *United States Army*, 837 F.2d 1428 (9th Cir. 1988), was vacated by the en banc court of appeals, and the case was decided on other grounds. *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc). Despite this great weight of contrary authority, petitioner challenges the court of appeals' decision on three grounds. There is no merit to any of those arguments.

2. Petitioner first contends (Pet. 12-21) that there was no rational basis for the Army to deny reenlistment to her simply because she is homosexual. That argument is premised (Pet. 14) on her observation that, although she admits that she is homosexual, the Army has no evidence that she has engaged in homosexual conduct. The court of appeals, in accordance with the Federal Circuit's decision in *Woodward* v. *United States*, *supra*, properly rejected that argument.

As the court of appeals noted (Pet. A42-A43), the Army's regulation "does not classify [petitioner] based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." The reasonableness of such an inference of homosexual conduct is apparent. Petitioner has repeatedly admitted that she is a homosexual. See, *e.g.*, Sep. App. 6, 8. She does not deny that she has engaged in or will engage in homosexual conduct. Pet. App. A43. Her admissions of her homosexuality, "if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." *Id.* at A42. Accordingly, the court of appeals properly recognized that her admissions constitute "compelling evidence that [she] has in the past and is likely to again engage in [homosexual] conduct." *Ibid.* The Army "need not shut its eyes to the practical realities of this situation, nor be com-

pelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts." *Id.* at A43.

Nevertheless, petitioner argues (Pet. 18-19) that it is irrational for the Army to bar homosexuals because heterosexuals can also engage in certain sexual acts that are made criminal by Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925. The Army, however, has determined that homosexual conduct is a greater problem in the military than is heterosexual conduct. Eight years ago, the Department of Defense issued a directive stating that, in its view, the presence of homosexuals in the military will

> adversely affect[ ] the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

Department of Defense Directive (DOD) No. 1332.14, at 1-9 to 1-10 (Jan. 28, 1982). Thus, since the Army's concern is with the potentially disruptive effect of homosexual conduct, it is obviously rational to exclude homosexuals while allowing heterosexuals to serve. Cf. *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.) (Army may prosecute homosexual sodomy even though it chooses not to prosecute heterosexual sodomy), cert. denied, 454 U.S. 864 (1981).

Petitioner's main point (Pet. 15-21) seems to be that there is no empirical basis for the Army's concern about homosexuals. Petitioner refers to the draft report of the Defense Personnel Security Research and Education Center (Perserec) (Dec. 1988) in support of her view that homosexuality

does not affect a soldier's ability to perform his or her job. The existence of that draft report, however, suggests at most that the Army's regulation is subject to reasonable debate; it does not show that the Army's policy is irrational. Indeed, the Perserec report itself recognizes that, although individual homosexuals may be good soldiers, there are important institutional factors that warrant further study (Perserec Report at 33):

> For the purpose of military organization * * * [the] quality of job performance may be less important than the effects of homosexuals * * * on that important but ephemeral quality: group cohesion. The important question to be raised in future research must center on the claims that persons with nonconforming sexual attitudes create insurmountable problems in the maintenance of discipline, group cohesion, morale, organizational pride, and integrity.

Thus, the draft report simply called for "engaging in empirical research to test the hypothesis that men and women of atypical sexual orientation can function appropriately in military units." Perserec Report at iii.

Furthermore, contrary to petitioner's suggestion (Pet. 15), the Army was not required to justify its regulation by submitting empirical data to the courts. That is clear from this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986), where the Court rejected the contention that the Army was required to submit empirical evidence to support the need for its dress regulations in a case where a serviceman claimed that those regulations violated his First Amendment rights. *Ibid.* The Court declared: "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Ibid.* The *Goldman* decision follows the long line of cases

holding that determinations regarding the composition and discipline of the military forces are better left to professional military judgments, subject to civilian control of the Legislative and Executive Branches. See *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Rostker* v. *Goldberg*, 453 U.S. 57 (1981); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). Not only are courts "ill-equipped" to make judgments about such military matters, *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), but our constitutional system places the responsibility for such decisions elsewhere. As the Court noted in *Ballard*, 419 U.S. at 510:

> This Court has recognized that "it is the primary business of armies and navies to fight or be ready to fight wars should this occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17. See also *Orloff* v. *Willoughby*, 345 U.S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U.S. Const., Art. I, § 8, cls. 12-14, and with the President. See U.S. Const., Art. II, § 2, cl. 1. * * *

See also *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931) (Congress has the authority to say "who shall serve * * * and in what way" in the military). The court of appeals, therefore, acted in accord with these principles when it determined that the Army's decision to exclude homosexuals was well within the professional discretion granted to military authorities.

3. Petitioner next contends (Pet. 24-30) that homosexuals are a "suspect class[ ]" for equal-protection purposes and, therefore, the court of appeals should have reviewed the Army's regulation under the strict-scrutiny standard. That argument is difficult to reconcile with *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in which this Court held that "the Federal Constitution [does not] confer[ ] a fundamental

right upon homosexuals to engage in sodomy." 478 U.S. at 190. If, as *Bowers* holds, the government may make homosexual acts a crime, it is implausible to say that those with a proclivity to commit such acts constitute a group that deserves special protection from the courts under the Equal Protection Clause.[3] Thus the court of appeals below properly joined the District of Columbia Circuit, *Padula* v. *Webster*, 822 F.2d 97, 103 (1987), and the Federal Circuit, *Woodward* v. *United States*, 871 F.2d at 1076, in rejecting the argument that the strict-scrutiny standard should apply to regulations that single out homosexuals for differntial treatment. [4] There is no conflict among the appellate courts over that issue.[5]

4. Finally, petitioner's claim (Pet. 21-24) that the Army's regulations violate her free-speech rights is without merit. As the court of appeals recognized (Pet. App. A31-A32), the Army's regulations implicate free speech only to the extent that an admission may be used to identify those who are homosexuals and thus ineligible for military service. Under the regulation, "Ben-Shalom is free * * * to say

---

[3] As the Federal Circuit stated in *Woodward*, 871 F.2d at 1076:

> After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula* v. *Webster* that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." 822 F.2d 97, 103 (D.C. Cir. 1987).

[4] Even prior to *Hardwick*, the courts of appeals had consistently refused to accord strict scrutiny to review of decisions adversely affecting homosexuals. See *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Beller* v. *Middendorf*, 632 F.2d 788, 807-810 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

[5] Petitioner cites (Pet. 24, 29) the panel opinion in *Watkins*, but as we noted above, that opinion was vacated by the en banc court and the case was decided on other grounds.

anything she pleases *about* homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes." *Id.* at A32 (emphasis added). It is the "identity" of petitioner as a homosexual that makes her ineligible for military service. *Ibid.*

It is clear that admissions may be used to exclude many classes of persons from the military (*e.g.*, minors or felons) without violating the First Amendment. Just as the First Amendment would not operate as a sort of "exclusionary rule" precluding the use of admissions establishing those facts, it also cannot be used to preclude the use of an admission of homosexuality. See *Johnson* v. *Orr*, 617 F. Supp. 170, 175 (E.D. Cal. 1985), aff'd mem., 787 F.2d 597 (9th Cir. 1986) (Table). As the court of appeals observed, petitioner's unqualified admission of homosexuality shows a propensity to engage in homosexual *conduct*, and "[i]n determining the composition of the armed forces, the Army does not have to take the risk that an admitted homosexual will not *commit homosexual acts* which may be detrimental to its assigned mission." Pet. App. A25-A26 (emphasis added).

In any event, the court of appeals correctly noted (Pet. App. A28-A32) that any incidental chilling effect on speech caused by the regulation does not rise to the level of a constitutional violation. Review of military regulations challenged on First Amendment grounds is "far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). See also *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding Army base's regulations banning speakers and demonstrations of a partisan political nature). There is no indication that the use of admissions of homosexuality has any substantial effect on the exercise of a soldier's right to speak freely. It simply is a legitimate way of iden-

tifying those persons who are ineligible for military service because of their homosexuality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

FEBRUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00742